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October 5, 2006

OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

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| Name of Case: | Personnel Security Hearing |
| Date of Filing: | October 26, 2005 |
| Case Number: | TSO-0302 |

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As set forth below, it is my decision, based on the evidence and testimony presented in this proceeding, that the individual's access authorization should not be restored at this time.

I. Background

The individual is employed by a Department of Energy (DOE) contractor and held an access authorization at the request of his employer. In February 2005, the individual reported his arrest on the charges of possession and trafficking of marijuana to DOE Security. DOE Security conducted a Personnel Security Interview (PSI) with the individual in May 2005 and suspended his security clearance in July 2005.

In August 2005, DOE Security informed the individual how to proceed to resolve the derogatory information that had created a doubt regarding his eligibility for access authorization. Notification Letter (August 30, 2005). The Notification Letter stated that the derogatory information regarding the individual falls within 10 C.F.R. § 710.8 (f), and (k) (Criteria F and K). DOE invoked Criterion F based on information in its possession that the individual "has deliberately misrepresented, falsified, or omitted significant information from a . . . Questionnaire for Sensitive Positions . . ." Enclosure 1 of Notification Letter at 2. According to the Notification Letter, the individual did not disclose his use of illegal drugs on a Questionnaire for National Security Positions (QNSP) that he completed in July 2004. Criterion K is invoked when a person has allegedly trafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances except as prescribed or administered by a physician or as otherwise authorized by Federal law. 10 C.F.R. § 710.8 (k). DOE invoked Criterion K based on the individual's arrest for the use and sale of illegal drugs.

In a letter to DOE Personnel Security, the individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). The Director of OHA appointed me as Hearing Officer in this case. After conferring with the individual and the appointed

DOE counsel, 10 C.F.R. § 710.24, I set a hearing date. At the hearing, the DOE counsel called the individual as its only witness. The individual, who was represented by counsel, also testified on his own behalf and elected to call five other witnesses. The transcript taken at the hearing shall be hereinafter cited as "Tr." Various documents that were submitted by the DOE counsel during this proceeding constitute exhibits to the hearing transcript and shall be cited as "Ex." Documents that were submitted by the individual during this proceeding are also exhibits to the hearing transcript and shall be cited as "Indiv. Ex." The individual tendered a group of supplemental exhibits that shall be cited as "Indiv. Supp. Ex."

II. Analysis

The applicable regulations state that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Although it is impossible to predict with absolute certainty an individual's future behavior, as the Hearing Officer I am directed to make a predictive assessment. There is a strong presumption against the granting or restoring of a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

I have thoroughly considered the record of this proceeding, including the submissions of the parties, the evidence presented and the testimony of the witnesses at the hearing convened in this matter. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c): the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of the participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant and material factors. After due deliberation, it is my opinion that the individual's access authorization should not be restored at this time because I cannot conclude that such a grant would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this determination are discussed below.

A. Findings of Fact

The individual began using marijuana while in his late 20's (approximately twenty years prior to the hearing). He admitted smoking marijuana regularly about five times a week. PSI at 9. In 1989, the individual was hired by a DOE contractor and was granted a security clearance at the request of his employer. Ind. Ex. 2. He continued to use marijuana,

smoking a joint upon his return home from work late at night, after his shift ended. Tr. at 19-20. The individual completed a QNSP in July 2004. Ind. Ex. 2; Ex. 7. On the QNSP, in response to questions regarding the individual's past or current drug use, he marked "no" when asked if he had used, purchased or sold drugs in the seven years preceding 2004. He also stated on the QNSP that he had never used drugs while holding a security clearance. Ex. 7.

On February 2, 2005, acting on an anonymous tip, the local police arrived at the individual's house one morning with a search warrant just as the individual was returning home from work. In a bathroom, the police found one and one-half ounces of marijuana, a dozen plastic sandwich bags, rolling papers and a set of scales. PSI at 5. They arrested the individual on possession of marijuana and marijuana trafficking. Ind. Ex. 11. The individual reported his arrest to DOE Security soon thereafter. As a result of the arrest, on February 18, 2005, the individual signed a one year agreement ("Last Chance Agreement") with his employer that required him to successfully complete an approved drug treatment program in order to retain his job. See Ind. Ex. 9 ("Last Chance Agreement"). DOE Security conducted a PSI with the individual in May 2005 in order to discuss the arrest.¹ DOE Security then suspended the individual's clearance in July 2005. See Ex. 1. Without a clearance, he had to take a different position with the contractor, and the new job paid almost two-thirds less than his previous position. In August 2005, the individual was found guilty of possession of marijuana and ordered to pay a fine and take random drug screens for 6 months at his own expense. Ind. Ex. 11.

B. DOE's Security Concerns

Criterion K deals with the use of illegal drugs. Illegal drug use may cause an individual to act in a manner that is inconsistent with the best interests of national security while under the influence of such substances. See Attachment to Memorandum from Assistant to the President for National Security Affairs, "Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information," at 11 (December 29, 2005) (Revised Adjudicative Guidelines). Also, illegal drug use indicates a willingness to ignore the law that could be reflected in the clearance holder's attitude toward security requirements. See, e.g., *Personnel Security Hearing*, 28 DOE ¶ 82,816 (2001); *Personnel Security Hearing*, 28 DOE ¶ 82,756 (2000). The individual's arrest for drug use and his admission of long-term drug use are well documented in the record, and validate the charges under Criterion K.

Criterion F deals with falsification. The DOE personnel security specialist explained DOE's security concerns about falsification during the PSI. PSI at 17. DOE Security is concerned about the honesty of any person who intentionally omits, falsifies or provides misleading information. Security programs are based on trust, and an individual could be subject to coercion because of a dishonest act. *Personnel Security Hearing*, 28 DOE ¶ 82,829 at 85,871, OHA Case No. VSO-0466 (2001); *affirmed* (OS, April 3, 2002). Based on the record before me, I find that the individual deliberately omitted significant information on his

¹ During the PSI, the individual agreed to be evaluated by a DOE consultant-psychiatrist, but DOE did not schedule an evaluation. PSI at 19.

QNSP. 10 C.F.R. § 710.8 (f). Failure to provide truthful answers during the security clearance process is of special interest. Revised Adjudicative Guidelines at 7. Thus the security concern regarding the individual's omission is valid, and the agency has properly invoked Criterion F in this case.

C. Hearing Testimony

1. The Individual

The individual testified that he used marijuana about five times a week for almost 20 years. However, he insisted that he never smoked in front of his wife or children, but instead would smoke outside when everyone was asleep. He said that he smoked in order to wind down after his shift so that he could go to sleep. He purchased his marijuana from the same person, and did not ever buy from street dealers. He has not seen or talked to that person since the arrest, and no longer associates with individuals who smoke marijuana. Tr. at 24.

He said that he was not a trafficker, and had only sold a total of about four ounces to a family member in all the years that he smoked. He has since disassociated himself from that family member. *Id.* at 55-56. He explained the presence of the scales in his bathroom by saying that he used the scales to confirm the weight of his purchases, and not to package drugs for sale. He admitted that he lied on his QNSP because of the negative impact that the disclosure of drug use would have on his job. *Id.* at 21. He did not think marijuana use was "a big deal." *Id.* at 21. However, he knew that it was prohibited to use drugs while holding a clearance and admitted that he had been briefed on that issue in the past. *Id.* at 21-22.

After the arrest, the individual attended five counseling sessions over five weeks, beginning in February 2005. Tr. at 59. He also had court-ordered drug screens once a month. Ex. 9, Att. 2; Tr. at 23, 33, 45. He attended a few AA meetings, but explained that the group leaders asked him not to return because his problem was with drugs and not alcohol. According to the individual, he was not able to attend Narcotics Anonymous because the local meetings were held in various locations, all at long distances from each other. Tr. at 57. He contends that he has not smoked any marijuana since his arrest, and does not feel the need to consume the drug anymore. *Id.* at 24. He passed all of his drug screens and does not intend to use drugs again. *Id.* at 44. The individual expressed great remorse over the harm that he has done to his family. *Id.* at 39. He has had his pay drastically reduced, and now works a second job in order to keep his children in school. *Id.* at 22. He has become more active in his church. *Id.* at 24. The individual repeatedly stressed the importance of his family to his life. *Id.* at 39.

2. Other Witnesses

The individual's wife, minister, supervisor, colleague and a family friend also testified on his behalf. His wife testified that she had been married to the individual for 23 years, that he has been a good father and husband over the years, and that he was very active in the church, especially since he no longer worked a night shift. Tr. at 63-66. She was surprised by his arrest, and insisted that she was unaware that he smoked marijuana regularly for the past 20 years, although she admitted that early in their relationship, he had smoked

marijuana in her presence. *Id.* at 69-77. She stressed the hardship that the family has undergone since his arrest and admitted that she considered leaving her husband because of the pain he put the family through with his arrest. *Id.* at 74. Nonetheless, she stated that she would support him because of their long marriage, and because she did not believe in running away from problems. *Id.* at 91. She testified that the individual has not used drugs since his arrest, to her knowledge, and that there has been no marijuana in the house since the arrest in February 2005. *Id.* at 73, 81. She described her husband as “changed” since his arrest. She argues that his feelings for his family would prevent him from doing anything like this again. *Id.* at 73, 89. She believes him to be an honest person. and she supports him now because she does not believe that he will do this again. *Id.* at 74-75

The individual’s minister testified that he has known the individual for four years, and although not a regular churchgoer prior to the arrest, he is now a very active and respected church member. Tr. at 92, 100-101. He was surprised by the arrest, and had no idea that the individual smoked marijuana. *Id.* at 94. The individual has shared his arrest information with the church members publicly during service. *Id.* at 95. He feels that the individual is trustworthy.

A friend of the family also testified. She described the individual as a person of good character. Tr. at 105. She was very impressed by his closeness with his son, and as a result asked him to mentor her son. *Id.* at 117. She has never seen him smoke marijuana and never smelled it on his clothes or in his home. *Id.* at 108. She described the individual as “very remorseful” since his arrest, and more active in church. *Id.* at 117. Even after being informed that the individual lied on his QNSP, the witness continues to trust and respect the individual. *Id.* at 111-114.

The individual’s supervisor testified that he has known the individual for 17 years, and that they have worked closely together for eight months prior to the hearing date. He considers the individual to be dependable, trustworthy, and to have a good work ethic. He has never seen the individual under the influence of any substance. The supervisor was somewhat troubled by the falsification on the QNSP and said that omission might lead him to question the individual’s trustworthiness. Tr. at 118-125. A colleague of the individual, an acquaintance of 15 years, testified that the individual is a good worker, dependable and reliable. He has never seen any sign of substance abuse in the individual’s behavior. The colleague testified that despite the falsification on the QNSP, he still considers the individual to be reliable and sincere in admitting his mistake. *Id.* at 129-131.

D. Mitigation of Security Concerns

1. Criterion K – Drug Use

In a Part 710 proceeding, the Hearing Officer gives great deference to the expert opinions of mental health professionals regarding rehabilitation or reformation from the use of illegal substances. See *Personnel Security Hearing*, Case No. VSO-0476, 28 DOE ¶ 82,827 (2001). However, in the instant case, the individual was not evaluated by a DOE consultant psychiatrist and no mental health professional testified for either party.

Therefore, I must rely on the record and my observations at the hearing, and make a common-sense judgment on this matter as directed by 10 C.F.R. § 710.7 (c). After carefully reviewing the record and the Revised Adjudicative Guidelines, I find that the individual has mitigated the security concerns regarding his use of marijuana. First, the individual has demonstrated an intent not to abuse drugs in the future by (1) abstaining from drug use in the 13 months prior to the hearing and (2) disassociating himself from drug-using associates, contacts, and family members, including the person who sold him drugs in the past and the family member to whom the individual sold marijuana over the years. Further, the individual has presented evidence of the satisfactory completion of both a prescribed drug treatment program and the requirements of the “Last Chance Agreement” with his employer. Ind. Supp. Ex. 1, 4, 5. He has also presented evidence of a series of random drug screens that are negative for the presence of any illegal substance. Ind. Ex. 3-5, 7, 8. Given the satisfactory completion of the treatment program, the support of his social network, and the credibility of the individual’s expressions of remorse regarding his past drug use, I conclude that the individual has a low risk of relapse. Therefore, based on the above, I find that the individual has mitigated the Criterion K security concerns. Revised Adjudicative Guidelines at 12.

2. Criterion F - Falsification

Our previous decisions have stated that in order to resolve cases involving verified falsifications or misrepresentations, Hearing Officers must look at the statements of an individual, the facts surrounding the misrepresentation or false statement, and the individual’s subsequent history in order to assess whether the individual has rehabilitated himself from the falsehood and whether restoring the security clearance would pose a threat to national security. *See Personnel Security Hearing* (Case No. VSO-0327), 27 DOE ¶ 82,844 (2000), *aff’d*, *Personnel Security Review* (Case No. VSA-0327), 28 DOE ¶ 83,005 (2000) (*aff’d* by OSA, 2000).

In most cases in which Hearing Officers have concluded that security concerns raised by evidence of falsification have been resolved, a substantial period of time has passed since the falsification that has allowed the individual to establish a pattern of responsible behavior. In those cases where an individual was unable to establish a sustained period of responsible behavior, Hearing Officers have generally determined that the individual was not eligible to hold an access authorization. *See Personnel Security Hearing*, Case No. VSO-0448, 28 DOE ¶ 82,816 (2001) (11 months insufficient to mitigate four year period of deception); *Personnel Security Hearing*, Case No. VSO-0327, 27 DOE ¶ 82,844 (2000) (less than one year of truthfulness insufficient to overcome long history of misstating professional credentials); *Personnel Security Hearing*, Case No. VSO-0289, 27 DOE ¶ 82,823 (1999) (19 months since last falsification not sufficient evidence of reformation from lying about drug use).

After reviewing the evidence in the record and assessing the credibility of the individual’s testimony at the hearing, I conclude, for the following reasons, that he has not mitigated the security concern arising from the deliberate omission of significant information on his QNSP. *See Personnel Security Hearing*, Case No. VSO-0466, 28 DOE ¶ 82,829 at 85,872 (2001); *aff’d* (OS April 3, 2002) (describing factors to consider in mitigation of falsification).

First, the record contains evidence of deliberate falsification or omission. This is set forth above. The individual used drugs during all the years he worked for the contractor, including the seven-year period referenced in the QNSP. He admitted that he lied about his drug use in order to retain his clearance. Tr. at 137, 153. Second, the individual did not come forward voluntarily to correct the record. He did not disclose his drug use to security until it was publicly exposed by his arrest. Third, the individual maintained the falsification for 16 years while he was holding a clearance. According to his QNSP, he was first investigated for and received a clearance in 1989. Ind. Ex. 2 at 2. The individual admitted that he had been briefed and was advised that clearance holders must not use drugs, yet he continued to use marijuana regularly for the 16 years that he held a clearance. Sixteen years is a very long time to maintain a falsification. The individual also deceived his friends and family during that time.² Finally, the individual did not disclose his drug use to DOE Security until his PSI in May 2005. That disclosure occurred approximately ten months prior to the hearing. Ten months of honesty is insufficient evidence of reformation from falsification, especially taking into consideration the fact that the individual did not come forward voluntarily to renounce his falsifications. See *Personnel Security Hearing*, Case No. TSO-0008, 28 DOE ¶ 82,910 (2003) (individual maintained falsehoods on QNSP until confronted by personnel security specialist in PSI one year later); *Personnel Security Hearing*, Case No. VSO-0289, 27 DOE ¶ 82,823 (1999) (19 months since last falsification is insufficient evidence of reformation).

In summary, this is a case of the deliberate falsification of security documents—the individual intended to hide his drug use from DOE security in order to keep his job, and he was not forthcoming until publicly exposed by his arrest. After his marijuana use was discovered, the individual was remorseful, forthright and credible in explaining the frequency of his drug use and the effect that his behavior has had on his family. All of his witnesses considered him to be a reliable and trustworthy person. Nonetheless, too little time has passed since his falsifications were uncovered to persuade me to find sufficient mitigation of the charge. While I believe his testimony that he intends to be honest with DOE in the future, more time is needed to test the strength of his resolve. As Hearing Officer, I must consider the relevant factors and circumstances connected with the individual's conduct. The individual is a 50-year old who used marijuana regularly during the 16 years that he held a security clearance, and who knew the prohibition on and consequences of using illegal drugs while holding a clearance. He hid his drug use from his family and employer until publicly exposed by his arrest. I can find no evidence in the record to suggest that the individual would have come forward with the truth had he not been arrested. Thus, I conclude that the individual has not mitigated the Criterion F security concern.

II. Conclusion

As explained in this Decision, I find that the DOE Operations Office properly invoked 10 C.F.R. § 710.8 (f), and (k). However, the individual has presented adequate mitigating factors for Criterion K that alleviate the legitimate security concerns of the DOE Operations

² I did not find the statements of the individual's wife that she was not aware of his regular marijuana use to be credible, especially considering the length of their marriage.

Office as regards that criterion. Nonetheless, the individual has not mitigated the concerns that gave rise to the charge of Criterion F. In view of that criterion and the record before me, I cannot find that restoring the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should not be restored at this time. Any party may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Valerie Vance Adeyeye
Hearing Officer
Office of Hearings and Appeals

Date: October 5, 2006